

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

SAMAROO, et al., :
Plaintiffs, : 11-CV-3391 (HBP)
v. :
DELUXE DELIVERY SYSTEMS, INC., : 500 Pearl Street
et al., : New York, New York
Defendants. : December 9, 2013

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TRANSCRIPT OF CIVIL CAUSE FOR MOTIONS CONFERENCE
BEFORE THE HONORABLE HENRY B. PITMAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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For the Defendants: RICHARD SPITALERI, JR., ESQ.
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<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Alpheus Calderon	5	12	15	16
Carlton Borris	18	21		

EXHIBITS

<u>Plaintiff's</u>	<u>MARKED</u>	<u>RECEIVED</u>
1 Declaration	9	

1 THE CLERK: Samaroo v. Deluxe Delivery Systems.

2 Counsel, please state your name for the record.

3 MS. SCHALET: For plaintiffs, Lizabeth Schalet of
4 Lipman & Plesur.

5 MR. SPITALERI: For defendants Deluxe Delivery
6 Systems, Yoindra Ramnarayan, Richard Spitaleri of Jasinski PC.

7 THE COURT: Good afternoon. We are here as a follow
8 up to the conference that we had in late November and the
9 principle issue to be resolved today is plaintiff's contention
10 that defendant have engaged in conduct to interfere with the
11 settlement of this case.

12 Ms. Schalet, do you have witnesses you want to call
13 or what do you want to do?

14 MS. SCHALET: I do, Your Honor.

15 THE COURT: Okay. All right.

16 MS. SCHALET: Okay.

17 MR. SPITALERI: Your Honor, I would just object to
18 this. The scope of this hearing as I understood it was to
19 question the individuals who did not sign the settlement
20 agreement.

21 THE COURT: I don't know who the witnesses are yet.
22 I mean who are the witnesses?

23 MR. SPITALERI: The witnesses are individuals who
24 have signed the settlement agreement.

25 THE COURT: Who are the witnesses? What are their

1 names?

2 MS. SCHALET: Their names are Alpheus Calderon. He
3 is the plaintiff who signed the declaration that I handed up
4 last time, Your Honor.

5 THE COURT: The declaration you handed up last time
6 was unsigned. There was -- you didn't hand me a signed
7 declaration. It was an unsigned declaration.

8 MS. SCHALET: I do have a signed copy now. I had
9 explained unfortunately I had left it in my office because it
10 was prepared that day and I ran out without it by mistake.
11 However --

12 THE COURT: The copy that's up here now is unsigned.

13 MS. SCHALET: Okay. I'd like to give you the signed
14 one.

15 THE COURT: Mr. Jasinski has a copy?

16 MS. SCHALET: I will hand it to him as well.

17 MR. SPITALERI: I'm actually Mr. Spitaleri.

18 THE COURT: I'm sorry.

19 MR. SPITALERI: That's okay.

20 THE COURT: My apologies.

21 MR. SPITALERI: Thank you. This is the first time
22 I'm seeing this. I think this is also the first time anyone
23 from my firm has seen this document. I'd just like to note
24 that.

25 THE COURT: Well, is this the same document that you

1 handed up the unsigned version of last time?

2 MS. SCHALET: It is. It's the same one.

3 THE COURT: That copy was given -- it was Mr.
4 Jasinski the last time, was it not?

5 MR. SPITALERI: That's right, Your Honor, it was.
6 Yes.

7 THE COURT: Well, he got a copy of it the last time.
8 So your firm had a copy of it. Let me just take a look at
9 this.

10 [Pause in proceedings.]

11 THE COURT: The objection is overruled. I'll hear
12 from Mr. Calderon.

13 MS. SCHALET: Okay.

14 THE COURT: Mr. Calderon.

15 MS. SCHALET: If you could take the stand.

16 Alpheus Calderon, Plaintiff's Witness, Sworn

17 THE CLERK: Please state your name and spell your
18 last name slowly for the record.

19 THE WITNESS: It is Alpheus Calderon, A-L-P-H-E-U-S,
20 C-A-L-D-E-R-O-N.

21 THE CLERK: Thank you. Please be seated.

22 THE COURT: Ms. Schalet, go ahead.

23 MS. SCHALET: Thank you.

24 DIRECT EXAMINATION

25 BY MS. SCHALET:

Calderon - Direct

6

1 Q. Are you a driver for Deluxe Delivery Systems?

2 A. Yes, ma'am.

3 Q. How long have you been working for them?

4 A. Approximately about four to five years.

5 THE COURT: Four to five -- how many, four to five
6 years?

7 THE WITNESS: Yes.

8 Q. What do you do as a driver for Deluxe, very briefly?

9 A. Well, I deliver food in the morning from the school, lab
10 school or any school they send me to from the morning from
11 approximately about nine to about twelve, 12:30.

12 Q. What do you do after that?

13 A. After that other jobs they give me to do. Pick up from
14 the warehouse in the morning and deliver to various schools or
15 offices. Then they call me in the afternoon to pick up other
16 stuff from [inaudible] or any of the odd jobs.

17 Q. Were you present at the settlement conference in this
18 courtroom on July 11, 2013?

19 A. Sure.

20 Q. Did you understand that the case was settled?

21 A. Yes, ma'am.

22 Q. Did you continue work for Deluxe Delivery?

23 A. Yes, ma'am, according to the agreement they made.

24 Q. Who were your immediate supervisors at Deluxe?

25 A. Roy and Tice and sometimes [inaudible] job there

Calderon - Direct

7

1 [inaudible].

2 THE COURT: I'm sorry. Who -- the names of your
3 immediate supervisors were what?

4 THE WITNESS: Roy Henry and Tice.

5 THE COURT: That was Tice Thompson?

6 THE WITNESS: Yes.

7 THE COURT: Go ahead.

8 MS. SCHALET: Thank you.

9 BY MS. SCHALET:

10 Q. Did you have any conversations with either of them about
11 the settlement after July 11th when we were here in court
12 settling the case?

13 A. No, ma'am.

14 Q. Did you have a conversation with them before that?

15 A. Before that about the case?

16 Q. Let me back up. Did you speak with Tice Thompson about
17 the settlement?

18 A. No, I did not. Tice only call me in after the settlement
19 to offer me some money to [inaudible].

20 Q. Okay. That's what I'm talking about. What happened?

21 A. Well, he called me in the back room and he tell me if I
22 take this amount of money and I sign it that money is going to
23 be -- don't sign the paper.

24 Q. Did he offer you anything else?

25 A. No. That's it. Just the funds.

Calderon - Direct

8

1 Q. How much did he offer you?

2 A. He said three thousand bucks.

3 Q. Do you remember approximately when this conversation was?

4 A. It was -- it was in the afternoon when I came back to
5 Deluxe to pick up some school delivery.

6 Q. Do you know the month?

7 THE COURT: Do you have a date?

8 THE WITNESS: I can't quite remember dates you know.

9 THE COURT: A month?

10 THE WITNESS: I think it was July.

11 THE COURT: Was it before --

12 THE WITNESS: It was right after, right after the
13 settle -- I know it was right after the settlement, about a
14 week after the settlement.

15 THE COURT: Go ahead.

16 Q. What did you tell him?

17 A. I told him I'm going to think about it. I will look into
18 it and think about it.

19 Q. Did you have any conversations with defendant Ryan
20 Ramnarayan about the settlement?

21 A. Yes, he approached me.

22 Q. Where was that?

23 A. It was in Lombardi, the warehouse also.

24 Q. Do you recall approximately when this was?

25 A. It was about -- it was when I -- I didn't sign the paper

Calderon - Direct

9

1 right there [inaudible] he asked me if I signed it I said no,
2 I didn't sign it so then that's when he offered. He tell me
3 you sign it so he offered me -- he going to give me that
4 amount of money if I --

5 Q. How much was that?

6 A. He said about \$3,000.00 and then he came back. Next time
7 he saw me he said he's going to make it better. He would give
8 me four.

9 Q. What did you tell him?

10 A. I told him I'm going to think about it.

11 Q. Now, I'd like to show you a document.

12 MS. SCHALET: May I?

13 THE COURT: Why don't you show it to your adversary
14 first?

15 MS. SCHALET: Okay.

16 THE COURT: Is it marked?

17 MS. SCHALET: No, this is the same document that I
18 just handed up earlier to --

19 THE COURT: I understand but don't you want to have a
20 record that's clear?

21 MS. SCHALET: Can we mark this as Exhibit 1, please?

22 (Plaintiff's Exhibit 1, Marked.)

23 THE COURT: Go ahead.

24 BY MS. SCHALET:

25 Q. Could you take a look at that, please? Can you turn to

Calderon - Direct

10

1 the last page? Is that your signature?

2 A. Yes, ma'am.

3 Q. Can you tell me the circumstances of how this came about,
4 this declaration?

5 A. Well, they call me to the office and the guy -- Roy and
6 Tice was there, I no longer can work at the company because I
7 sue the company and he said I can no longer work there. So I
8 said okay -- I told them there was an agreement. It's only
9 when the settlement is paid up then we can vacate the job when
10 they say --

11 THE COURT: They can what the job?

12 THE WITNESS: Vacate the job.

13 THE COURT: Vacate?

14 THE WITNESS: Yes, leave the job. Leave the job.

15 THE COURT: Go ahead.

16 THE WITNESS: That's what I told them but they didn't
17 know [inaudible] see you. So I told them okay, see you.

18 Q. Then what happened?

19 A. That's when I call you to get advice on what -- and tell
20 you what took place.

21 Q. And --

22 THE COURT: I'm sorry, go ahead. Go ahead.

23 Q. Then did there come a time when you received this
24 declaration from our office?

25 A. I didn't [inaudible].

Calderon - Direct

11

1 Q. I said did you -- did there come a time when you received
2 this declaration from our office? That's the one [inaudible].

3 A. Yes.

4 Q. A copy of it?

5 A. A copy of this?

6 Q. Yes.

7 A. Yeah.

8 Q. How did you receive it?

9 A. By fax.

10 Q. Then what happened?

11 A. That's when I signed this thing and fax it back to you.

12 Q. So can you take a moment to review it? Then I'm going to
13 ask you if it's accurate.

14 [Pause in proceedings.]

15 A. Yes, ma'am.

16 Q. Is there anything missing from here?

17 A. No.

18 Q. Was there a time when Roy Henry called you and offered
19 you something?

20 A. Well, yes. Roy Henry called me before Tice spoke to me
21 and offered me a settlement over the phone at approximately
22 5:00 in the morning he called me on the phone.

23 Q. What happened during that call?

24 A. Well, I dismissed him. I told him when I get to the
25 office I will approach him.

Calderon - Cross

12

1 Q. Okay. Thank you.

2 THE COURT: Cross exam?

3 CROSS-EXAMINATION

4 BY MR. SPITALERI:

5 Q. Mr. Calderon, you stated that you signed this
6 certification correct?

7 A. Sure.

8 Q. Did you prepare the certification yourself?

9 A. No, I said over the telephone I told him Ms. Schalet what
10 is the situation.

11 Q. You didn't write this yourself?

12 THE COURT: First of all, let the witness finish
13 answering the question before you put another one. Go ahead.
14 Do you want to finish your answer, Mr. Calderon?

15 THE WITNESS: Yes.

16 A. So I told exactly what is the situation and she jot it
17 down or write it and fax me the copy. I look over it and
18 that's what exactly what I told her over the telephone.

19 Q. It's just a yes or no question. You did not prepare this
20 document yourself; correct? Did you prepare this document
21 yourself, yes or no?

22 A. Well --

23 THE COURT: I think he explained what happened. He
24 called his counsel. He related the facts to counsel and
25 counsel prepared the affidavit, sent it to him and he signed

Calderon - Cross

13

1 it.

2 BY MR. SPITALERI:

3 Q. So you signed it on the same day you had the conversation
4 with Ms. Schalet?

5 A. Yes, sir.

6 Q. And that was also the same day you allegedly had a
7 conversation with Mr. Henry?

8 A. Yes, the same day, yeah.

9 Q. You stated under direct examination that when you
10 provided -- you provide independent contractor services to
11 Deluxe Delivery Services?

12 A. Repeat yourself.

13 Q. You provide independent contracting services for Deluxe
14 Delivery? Do you do business --

15 THE COURT: It's not really relevant.

16 MR. SPITALERI: Your Honor, I believe it is relevant.
17 He testified in his direct examination as to when he picks up
18 lunches and I'd like to clarify that.

19 THE COURT: No, it's irrelevant.

20 MR. SPITALERI: He stated that he picks up lunches
21 for --

22 THE COURT: I've ruled. Your motion for
23 reconsideration is denied. Move on.

24 BY MR. SPITALERI:

25 Q. You stated that you had a conversation with Tice in July.

Calderon - Cross

14

1 Is that correct?

2 A. Yes, sure.

3 Q. Did you inform your counsel of this conversation with Mr.
4 Thompson? You referred to Mr. Tice Thompson; correct?

5 A. Yes, sir.

6 Q. Did you inform your counsel back in July of this
7 conversation you had with Mr. Thompson?

8 A. I let her know -- aware from what the guy has been
9 saying.

10 Q. I'm sorry.

11 A. I let her know what the guy has been saying about
12 offering of the money.

13 Q. Did you tell her this in July when the conversation
14 happened?

15 A. Yeah.

16 Q. You called Ms. Schalet in July and you told her of the
17 conversation with Mr. Thompson where he offered you money not
18 to sign the settlement agreement. Is that what your testimony
19 is?

20 A. Yes, I told her the guy talking about settle -- if we
21 give you certain amount of money if you will not sign the
22 paper.

23 Q. Just so it's clear, you had this conversation with her in
24 July?

25 A. Sure.

Calderon - Redirect

15

1 Q. Do you still do business with Deluxe Delivery Services?

2 A. Yes, I work for them, yeah.

3 Q. I'm sorry.

4 A. Yes, I work for them, yeah.

5 Q. Is your testimony that you still work for them?

6 A. Yes, I work for them.

7 Q. Is it your testimony --

8 THE COURT: He said yes, he stills work for them.

9 MR. SPITALERI: Okay. I don't have anything further,
10 Your Honor.

11 THE COURT: Any redirect?

12 REDIRECT EXAMINATION

13 BY MS. SCHALET:

14 Q. Did you have any conversation with any of the other
15 drivers at Deluxe about whether or not they had been offered
16 any money?

17 MR. SPITALERI: Objection.

18 THE COURT: Sustained. That's beyond the scope of
19 cross.

20 Mr. Calderon, I'm not -- there's something I don't
21 understand. Maybe you can clarify it for me. Were you or
22 were you not fired from Deluxe?

23 THE WITNESS: I was fired.

24 THE COURT: And they hired --

25 THE WITNESS: They call me back right after

Calderon - Recross

16

1 [inaudible] Ms. Schalet in the afternoon. That's when the
2 guys call me back and tell me come back and pick your route.

3 THE COURT: How long -- what was the interval between
4 -- let me phrase it differently. How long were you out of
5 work for?

6 THE WITNESS: Well, the --

7 THE COURT: Did they hire you back the same day you
8 were fired?

9 THE WITNESS: The same day in the afternoon they call
10 me back about 4:00.

11 THE COURT: I see.

12 THE WITNESS: They call me back.

13 THE COURT: I see. Did you lose any work?

14 THE WITNESS: Yeah, the whole say I was out of work.

15 THE COURT: So you lost one day of work?

16 THE WITNESS: Just one day, yeah.

17 THE COURT: Anything else based on my questioning,
18 Ms. Schalet?

19 MS. SCHALET: No.

20 THE COURT: Mr. Spitaleri, anything else based on my
21 questioning?

22 MR. SPITALERI: Yes.

23 RECROSS EXAMINATION

24 BY MR. SPITALERI:

25 Q. What was that day, November the 26th?

Calderon - Recross

17

1 A. It was -- it was last week, was it? I think it was
2 November 26.

3 Q. So it was --

4 A. It was the day that she was come to court. She was in
5 court that day. She had to come to court when I call her.
6 She said she had to go to court. She will address it.

7 Q. Did you perform any work on that day?

8 A. No. They call me into the office early in the morning
9 and tell me I have -- the conversation and they tell me my
10 services are no longer needed.

11 Q. They called you back that same day?

12 A. They call me back that same day, yeah.

13 MR. SPITALERI: I have nothing further, Your Honor.

14 THE COURT: Thank you, Mr. Calderon.

15 THE WITNESS: Sure.

16 THE COURT: You're free to go. Ms. Schalet, is there
17 another witness you want to call?

18 MS. SCHALET: I do, Your Honor. I have Carlton
19 Borris. He is another plaintiff and he has also signed a
20 declaration subsequent to our last conference and he isn't
21 somebody that I had disclosed prior but he has similar
22 testimony.

23 MR. SPITALERI: Your Honor, I would state the same
24 objection earlier and this time --

25 THE COURT: Same --

Borris - Direct

18

1 MR. SPITALERI: -- we've been ambushed. We had
2 no -- we had no knowledge that this was going to happen today.
3 We didn't know Mr. Borris was going to be called as a witness.
4 It was our understanding based on the order that the only --
5 the scope of today's hearing was to talk to the non signers
6 and neither one of these gentlemen -- I'm sorry, both of these
7 gentlemen did sign the settlement agreement.

8 THE COURT: The objection is overruled.

9 THE CLERK: Please raise your right hand.

10 Carlton Borris, Plaintiff's Witness, Sworn

11 THE CLERK: Please state your full name and spell it
12 slowly for the record.

13 THE WITNESS: Carlton Borris, B-O-R-R-I-S.

14 THE COURT: Ms. Schalet, go ahead.

15 MR. SPITALERI: Thank you.

16 DIRECT EXAMINATION

17 BY MS. SCHALET:

18 Q. Hello.

19 MR. SPITALERI: Your Honor, I just object. I haven't
20 even seen the document yet.

21 MR. SPITALERI: I haven't --

22 THE COURT: Why don't you show it? Are you going to
23 show the documents to the witness?

24 MR. SPITALERI: I was actually not going to use the
25 document because --

Borris - Direct

19

1 THE COURT: Fine.

2 MS. SCHALET: I'm not going to use the document.

3 THE COURT: Go ahead.

4 BY MS. SCHALET:

5 Q. So have you been employed by Deluxe Delivery Systems,
6 Inc.?

7 A. Yes, ma'am.

8 MR. SPITALERI: Objection. She's leading the
9 witness.

10 THE COURT: It's preliminary. Go ahead.

11 Q. When did you work there?

12 A. For two years.

13 Q. What's your position?

14 A. I'm a driver, Deluxe Delivery driver.

15 Q. Are you -- have you had conversations with Roy Henry
16 about the settlement of this case?

17 A. Yes, ma'am.

18 Q. Can you describe some of those conversations to the
19 court?

20 A. Well, he used to call me -- all right. Let me get it
21 clear. Before the settlement or after?

22 Q. Before.

23 A. Before he used to call me like 5:00 in the morning and
24 told me if I can write a paper, write on the paper that I no
25 longer want any dealing with the case, notarize it and bring

Borris - Direct

20

1 it to him. He told he's going to offer me \$500.00. I said
2 no, I'm not going to do it.

3 Q. Did this happen more than once?

4 A. Six, seven times.

5 Q. Did you have any conversations with anyone else about the
6 settlement --

7 A. No, he the only one.

8 Q. -- prior to July 11th when the case settled?

9 A. If I -- after the case settled?

10 Q. Prior, before.

11 A. No, he's the only one. Roy is the only one.

12 Q. Did you have any conversations with your co-workers?

13 A. Yes, Anthony. We talk, we just talk.

14 Q. Tell me about those conversations.

15 A. Anthony -- I was talking to him one time and he said I
16 have a [inaudible].

17 MR. SPITALERI: Objection. This is hearsay.

18 THE COURT: Yes. If you're offering it for the truth
19 of the matter asserted there then it's hearsay.

20 MS. SCHALET: It is hearsay. Withdrawn.

21 Q. Let's go to after the settlement was signed. Were you at
22 the settlement conference here on July 8th?

23 A. Yes, ma'am.

24 Q. Was it your understanding the case was settled?

25 A. Yes, ma'am.

Borris - Cross

21

1 Q. Did you have any conversations with anyone about the
2 settlement after that time you appeared in court?

3 A. No.

4 Q. Now, did there come a time when you stopped working for
5 Deluxe?

6 A. Yes.

7 Q. When was that?

8 A. Soon after I sign the agreement I was fired.

9 Q. Who did you have a conversation with, if any, about --

10 A. Roy Henry.

11 Q. What was the conversation?

12 A. I call him and I tell him that the school is reopen and
13 why I -- why am I not returning to work. He said you sue the
14 company, I have no further business with you.

15 Q. Thank you.

16 MS. SCHALET: Okay. Thank you.

17 THE COURT: Cross.

18 CROSS-EXAMINATION

19 BY MR. SPITALERI:

20 Q. Mr. Borris, you testified earlier that you were a driver.

21 A. Yes, sir.

22 Q. Are you an independent contractor?

23 A. Yes, sir.

24 MS. SCHALET: Objection.

25 THE COURT: Sustained. The answer is stricken. It's

Borris - Cross

22

1 irrelevant. I'm not sure -- you haven't laid a foundation
2 for -- to establish whether Mr. Borris knows what the
3 difference is between an independent contractor and an
4 employee.

5 MR. SPITALERI: I would like to do so, Your Honor.

6 THE COURT: It's irrelevant.

7 MR. SPITALERI: I think it is relevant because Ms.
8 Schalet asked questions about --

9 THE COURT: You made the same argument about ten
10 minutes ago. I ruled. You tell me why -- why is it relevant
11 to whether or not there's been misconduct in connection with
12 the settlement?

13 MR. SPITALERI: Because I think it goes to the
14 veracity of the witness. I mean they're claiming --

15 THE COURT: Whether he's an independent contractor
16 goes to his veracity?

17 MR. SPITALERI: Yes. Because they're filing tax
18 returns and they're reaping all the benefits of being an
19 independent contractor with the IRS and then they're turning
20 around and filing a wage and hour action. I would say --

21 THE COURT: Do you want to offer a tax return?

22 MR. SPITALERI: I don't have them because they
23 haven't been produced in discovery yet.

24 THE COURT: So how do you know what's in the tax
25 returns?

Borris - Cross

23

1 MR. SPITALERI: I would like to ask him that and lay
2 the foundation here.

3 THE COURT: No. Overruled.

4 MR. SPITALERI: I think it goes to his credibility.

5 THE COURT: Well, you don't have the tax returns with
6 you. So you don't know -- you can't impeach him with a prior
7 false statement under oath because you don't have the tax
8 returns.

9 MR. SPITALERI: But, Your Honor, respectfully, I'd
10 like to ask him what kind of tax returns he filed.

11 THE COURT: Overruled.

12 BY MR. SPITALERI:

13 Q. You said that you didn't have any conversations with
14 anyone from Deluxe after the settlement. Is that right? Is
15 that your testimony?

16 A. No, I have no -- no talk with no one.

17 Q. So you didn't speak to anyone from Deluxe after the
18 settlement was signed?

19 A. No.

20 THE COURT: About -- you didn't speak to anyone about
21 the settlement; is that right?

22 THE WITNESS: No, I didn't speak to anyone about
23 the -- just with Roy. He called me and --

24 THE COURT: No. After the settlement was signed I
25 presume you still spoke with Deluxe about your job, about

Borris - Cross

24

1 getting assignments, doing work?

2 THE WITNESS: School had closed so I was home. When
3 school close you be home for the two months.

4 THE COURT: I see. Okay.

5 THE WITNESS: So [inaudible].

6 THE COURT: I see. Go ahead.

7 THE WITNESS: I want to know what's going on.

8 BY MR. SPITALERI:

9 Q. So when was the last time you performed services for
10 Deluxe?

11 A. It was July the 27th was the last day.

12 Q. July 27th was the last day you performed services.

13 A. School closed for two months.

14 Q. Then you testified that you didn't perform any work after
15 you signed the settlement agreement.

16 A. No, no.

17 Q. The settlement agreement was entered into in June.

18 A. No, school was closed I told you. When school was
19 closed. So once school was closed I was home. So all the
20 time when -- every summer when you home it -- you still work
21 but you don't work for the summertime. You didn't work for
22 the summer but that's it, I didn't work for the summer. In
23 September.

24 Q. I'm sorry. It seems to me you're saying two different
25 things. You're saying you don't work in the summer but you've

1 also said that you worked in July.

2 A. No, no. July was the last date we work on school close
3 July -- school close August, September. I didn't work. We
4 don't usually work when school is closed. I work with the
5 schools. It's closed. September school open we start to work
6 again.

7 Q. So just to be clear. You stated you didn't work at all
8 after the settlement, the parties entered into the settlement.
9 Is that right?

10 A. Yes, I didn't work at all after that.

11 Q. The parties entered in -- I'm telling you, representing
12 to you that the parties entered into the settlement in June.

13 THE COURT: No. You ask questions on examination.
14 You can't testify. If you want to show him a document you can
15 show him a document but --

16 MR. SPITALERI: I got it. I have nothing further.

17 THE COURT: All right. Any redirect?

18 MS. SCHALET: No, Your Honor.

19 THE COURT: Mr. Borris, did schools close at the end
20 of June or at the end of July?

21 THE WITNESS: The end of July.

22 THE COURT: The end of July?

23 THE WITNESS: Uh-huh.

24 THE COURT: Summer school?

25 THE WITNESS: The end is the last day and the school

1 closed. That was it.

2 THE COURT: Okay. You're excused. Thank you.

3 Is there any other evidence you want to offer, Ms.
4 Schalet?

5 MS. SCHALET: No, Your Honor, not at this time.

6 THE COURT: I'm not sure -- given the testimony we
7 had today I'm not sure what your application is.

8 MS. SCHALET: Your Honor, I'd like to make a motion
9 to compel performance with the settlement agreement and based
10 on the testimony today and based on various cases I --

11 THE COURT: Well, you haven't -- last time you were
12 here I suggested to you that a memorandum of law and a formal
13 motion would really be helpful.

14 MS. SCHALET: Yes. And, Your Honor, I'd like to
15 submit that. I'm requesting permission to do that.

16 THE COURT: You don't need my permission to do it.
17 You can do it.

18 MS. SCHALET: Okay. I'd like to do that. I wanted
19 to wait until the --

20 THE COURT: Let me ask you something. I'm sorry to
21 interrupt you. One of the problems that we've had in this
22 case is my recollection is there are certain plaintiffs who
23 have refused to sign the release and the reason they have --
24 those plaintiffs -- am I correct that there are certain
25 plaintiffs who have refused to sign the release?

1 MS. SCHALET: Correct.

2 THE COURT: I'm not sure we have any evidence as to
3 the reason why those plaintiffs have refused to sign the
4 release, do we?

5 MS. SCHALET: Not as those plaintiffs.

6 THE COURT: Well, if we don't have -- if we have
7 plaintiffs who have refused to sign the release and the
8 release is one of the material terms of the settlement, has
9 there been full performance of the settlement from plaintiff's
10 side?

11 MS. SCHALET: No, but I think there's evidence that
12 the reason there can't be full performance is because
13 defendants have reached out to the plaintiffs after the
14 settlement, offered them a few thousand dollars --

15 THE COURT: What's the evidence that the plaintiffs
16 who have not signed the release have been influenced by the
17 defendants?

18 MS. SCHALET: The fact that they did it to two of the
19 other two current workers.

20 THE COURT: No, that's -- that's no evidence as to
21 the people -- as to the individuals who hadn't signed the
22 release and actually one -- I think Mr. Borris testified that
23 nobody contacted him after the settlement, that the
24 communications between the defendants and Mr. Borris were pre-
25 settlement. So you have evidence that they reached out to --

1 the evidence if credited is that they reached out -- the
2 defendants reached out to Mr. Calderon after the settlement.

3 MS. SCHALET: That's correct.

4 THE COURT: So that's one out of -- what were there,
5 20 plaintiffs or something?

6 MS. SCHALET: 16.

7 THE COURT: 16. So that's one out of 16.

8 MS. SCHALET: Well, that's one of the five current
9 plaintiffs. The remainder of the plaintiffs are no longer
10 employed.

11 THE COURT: I mean there's no -- as far as the
12 individuals who haven't signed the releases go -- look, I'm
13 not trying to prejudge your motion but it seems to me there's
14 no evidence as to why they haven't signed the release or
15 there's no evidence of coercion or undue pressure by the
16 defendants with respect to those plaintiffs.

17 MS. SCHALET: Well, Your Honor --

18 THE COURT: And the question I still have then is
19 that if those plaintiffs haven't executed the release has
20 there been full performance by plaintiffs. Go ahead.

21 MS. SCHALET: Well, Your Honor, I have two thoughts.
22 One is Mr. Borris had a number of conversations with the
23 plaintiffs that he's not able to testify to because they do
24 constitute hearsay. So that unfortunately is not going to be
25 evidence that we have here.

1 The other thing is that they were supposed to come
2 today and --

3 THE COURT: That's a good --

4 MS. SCHALET: -- tell us --

5 THE COURT: This is Mr. Clinton, Mr. Nwokiu and Mr.
6 Rosal? Have you been in touch with those individuals?

7 MS. SCHALET: I have not.

8 THE COURT: They're your clients and they're
9 unresponsive?

10 MS. SCHALET: One of them is arguably not my client
11 any more because he gave me a declaration saying that that I
12 submitted to the court during our last conference.

13 THE COURT: I don't recall that. Maybe --

14 MS. SCHALET: He was the one who signed the
15 declaration stating that he didn't want anything to do with
16 the case any more and it was okay with him if it was dismissed
17 with prejudice.

18 THE COURT: Yes. Now I remember who you're talking
19 about. Well, do you want me to have the Marshals go out and
20 enforce the order?

21 MS. SCHALET: Yes. I mean they should have come here
22 today. I don't know why they didn't.

23 THE COURT: We can do that. I'll wait for an order
24 to show cause as to the three of them as to why they shouldn't
25 be held in contempt and the Marshals will go out and serve it

1 personally. That usually gets a witness' attention.

2 MS. SCHALET: Okay, Your Honor. Thank you. I'd like
3 to go off the record when we're able for a moment.

4 THE COURT: Let me -- so your applic -- your motion,
5 the motion you're going to make is to enforce the settlement?:

6 MS. SCHALET: Yes.

7 MR. SPITALERI: Your Honor --

8 MS. SCHALET: Or --

9 THE COURT: Let me finish and then I'll hear from
10 you. Go ahead.

11 MS. SCHALET: Or to have these three severed and have
12 the settlement go forward for those that have already signed
13 and --

14 THE COURT: This is the discussion we've had before.
15 How -- the settlement was for all the plaintiffs. I mean if
16 all the plaintiffs are not bound by the settlement the value
17 of the settlement from defendant's point of view is
18 substantially diminished, is it not?

19 MS. SCHALET: Well, it's unclear because the reason
20 they wanted to have all the plaintiffs sign it because they
21 didn't want anyone working for them who had been part of this
22 settlement. Yet they have retained those three. They
23 continue to work for them. So the rationale for having all of
24 the plaintiffs no longer exist. I think that's further
25 evidence that they're playing games here.

1 THE COURT: It would seem to me that part of the
2 value of the settlement from a defendant's point of view is
3 the defendants are buying peace. They now that these
4 plaintiffs are not going to sue them -- are not going to sue
5 them for any claim that predates the date on which the
6 settlement was executed and if the settlement is not executed
7 on behalf of all the plaintiffs it seems to me the value of
8 the settlement is substantially diminished because the
9 defendants face the prospect of further litigation.

10 MS. SCHALET: I think the plaintiffs who haven't
11 signed it should be deemed to have failed to prosecute their
12 claims and their claims should be dismissed. Whether it's
13 with prejudice or without I don't know but I haven't heard
14 from them for many months and part of my application that I
15 want to make is as to the two that I haven't heard from for
16 many months. They have abandoned their claims.

17 THE COURT: Well, there was a case you cited to me
18 the last time before Judge -- there was a case before Judge
19 Gorenstein as I recall and in that case the claims were
20 dismissed without prejudice that substantially affects the
21 value of the settlement from defendant's point of view.

22 MS. SCHALET: Well, that would have to --

23 THE COURT: I'm still having a problem -- I think it
24 was -- was it Mr. Nwokiwu -- one of your plaintiffs you were
25 seeking to dismiss your own client's claims with prejudice

1 even though the client received no consideration.

2 MS. SCHALET: Well, that particular individual
3 submitted a declaration saying that he consented to dismissal
4 with prejudice that I pointed out a moment ago.

5 THE COURT: I understand but it's bizarre and I --
6 it's difficult to understand why a plaintiff would agree to
7 the dismissal of his own claim with prejudice if he doesn't
8 receive anything for it.

9 MS. SCHALET: He received something from the
10 defendants behind our back. That's why. They still have a
11 job.

12 THE COURT: Well, there's no evidence of that.

13 MR. SPITALERI: Your Honor --

14 MS. SCHALET: But that's our contention. That's why.

15 MR. SPITALERI: This is just hearsay.

16 THE COURT: Well, virtually everything a lawyer says
17 is hearsay. It's called argument. It's not evidence.

18 MR. SPITALERI: Right. But she's making up facts,
19 Your Honor.

20 MS. SCHALET: That's our assertion.

21 THE COURT: Mr. Spitaleri, what are your thoughts?

22 MR. SPITALERI: My thoughts are, Your Honor, I feel
23 like we sort of put the cart before the horse here. She
24 hasn't made her application yet, yet we're having an
25 evidentiary hearing with regard to that application. So we're

1 at a severe disadvantage. So I would like to reserve --

2 THE COURT: Did you purchase a transcript of what
3 occurred the last time or did you speak with Mr. Jasinski
4 about what happened the last time?

5 MR. SPITALERI: Your Honor, I did not read the
6 transcript but I did speak to my colleague Mr. Jasinski.

7 THE COURT: Then you knew what was going to happen
8 today.

9 MR. SPITALERI: I would just reserve the right after
10 we see plaintiff's application to bring our own witnesses to
11 testify. Your Honor, we completely agree with your assessment
12 of the settlement and we argued for total peace and unless she
13 can provide that we don't have a settlement here as far as
14 we're concerned.

15 THE COURT: If we have no settlement then we have a
16 case that's going to go to trial.

17 MR. SPITALERI: Yes. And I think it's probably time
18 that we start proceeding in that direction and start
19 relitigating the case because I feel like we've been dealing
20 with this issue with regard to -- trying to revive the
21 settlement agreement and it's -- I don't think it's going to
22 happen.

23 THE COURT: Let me -- is it -- is it the defendant's
24 contention that they have not spoken to the plaintiffs
25 regarding the litigation after the settlement, after the July

1 settlement conference?

2 MR. SPITALERI: I was not aware of the specifics that
3 are laid out in this declaration. It's my understanding
4 they've had conversations in the context of work and that some
5 of them may have been completely taken out of the context by
6 these individuals.

7 THE COURT: I'm not talking about conversations in
8 which plaintiffs are given work assignments, pick this up and
9 deliver it there. I'm not talking about those conversations.
10 But have there been conversations between the defendants and
11 the plaintiffs after the settlement conference about resolving
12 the case outside the context of a litigation?

13 MR. SPITALERI: Very brief, Your Honor. I've made an
14 offer to plaintiff's counsel and we've --

15 THE COURT: No, no. I'm talking about between the
16 defendants themselves and the individual plaintiffs. I'm not
17 talking about conversations between counsel.

18 MR. SPITALERI: I'm sorry. I'm just not following
19 the question, Your Honor.

20 THE COURT: After the July settlement conference,
21 have your clients spoken to the plaintiffs themselves, not
22 counsel, but have your clients spoken to the plaintiffs about
23 resolving the matter outside of the settlement that was
24 reached in July?

25 MR. SPITALERI: My understanding, no. They just had

1 candid conversations at work about work assignments and what
2 would happen if -- they may have been taken out of context.
3 That's my understanding of the facts.

4 THE COURT: What conversations do you believe may
5 have been taken out of context?

6 MR. SPITALERI: I don't know the specifics of them
7 and I'd have to speak to my client further about this.

8 MS. SCHALET: Your Honor --

9 THE COURT: Yes, go ahead.

10 MS. SCHALET: -- I think that the individuals who
11 were alleged to have engaged in these discussions should be
12 here in court.

13 THE COURT: Well --

14 MR. SPITALERI: Your Honor, I would object to that as
15 well.

16 THE COURT: The problem I'm having, Ms. Schalet, is
17 that the individuals -- there's no evidence as to the
18 individuals who have not signed the agreement and as to why
19 they haven't signed the agreement but we're going to have the
20 Marshals serve an order to show cause. There will probably be
21 a date in early January. I'll direct them to show up or show
22 cause why they shouldn't be held in contempt for ignoring the
23 order of November 26th.

24 When do you want to make your motion, Ms. Schalet?

25 MS. SCHALET: How is like January 5th?

1 THE COURT: All right. After you get her motion, Mr.
2 Spitaleri, why don't you send me a letter and tell me when you
3 want to submit your opposition by.

4 MR. SPITALERI: Great, Your Honor.

5 THE COURT: I'll agree to any reasonable schedule.

6 MR. SPITALERI: It will be one of my colleagues. I'm
7 actually leaving my firm on Friday. So I won't be around.

8 THE COURT: Well, it's all the firm of Jasinski.
9 You're all one [inaudible] to me.

10 There's a case counsel -- there are limitations on
11 the conversations that counsel -- that the -- that defendant
12 can have with a class plaintiff or I think even a collective
13 plaintiff concerning a litigation. There's a case from Judge
14 Schwartz that addresses this, a called Ralph Oldsmobile v.
15 General Motors Corp. It was decided on September 7, 2001.
16 It's a 2001 Westlaw 1035132. Once again it's Ralph Oldsmobile
17 v. General Motors Corp., 2001 Westlaw 1035132.

18 MS. SCHALET: Your Honor --

19 THE COURT: One second.

20 [Pause in proceedings.]

21 THE COURT: The general subject is also discussed in
22 a case by Judge Francis called Wu, W-U, against Pearson
23 Education, 2011 Westlaw 2314778. I think that's probably
24 enough for now.

25 What did you want to say?

1 MS. SCHALET: Your Honor, I think that these
2 conversations that we alleged defendants have completely
3 frustrate the collective action procedures within the FLSA.
4 The whole reason there is a collective action is so that an
5 employer can't go around coercing people to accept a very
6 small amount of money and give up their claims.

7 I also think that this case is still a class action.

8 THE COURT: Well, the problem -- I don't think it's
9 ever been certified as a class action. I looked at the docket
10 sheet today and there's no certification of it as a class
11 action. So it's not a certified class action and the problem
12 with the first proposition you just articulated is there's
13 still no evidence of coercive conversations with respect to
14 the individuals who have not signed the settlement agreement.

15 MS. SCHALET: Your Honor, I would just --

16 THE COURT: Go ahead.

17 MS. SCHALET: The last thing I would point out is
18 that there is a lot of cases pursuant to Rule 23(d) regarding
19 how the court can manage a class action and all of those cases
20 apply to cases that have not have been certified where it's
21 putative class members who have been contacted. So I do think
22 those cases are relevant.

23 THE COURT: Well, I look forward to reading about
24 them in your memorandum of law.

25 What did you want to say, Mr. Spitaleri?

1 MR. SPITALERI: It's really not that important. I
2 just wanted to say that all this argument that Ms. Schalet is
3 making assumes that this is a class action which it's not even
4 close. She hasn't even made a motion to conditionally certify
5 I don't believe at this stage and that usually comes --

6 THE COURT: Well, there are a number of plaintiffs
7 who have joined and I think it's -- my recollection is it's a
8 punitive class action. It hasn't been certified yet because
9 we had the settlement conference that I thought had been
10 successful.

11 Let me ask you this. If all the plaintiffs sign the
12 settlement agreement is defendant still on board with signing
13 it?

14 MR. SPITALERI: I believe so, Your Honor, yes.

15 THE COURT: They have to. It's on the record.

16 I look forward to getting plaintiff's motion on
17 January 5th. I'm going to issue an order to show cause to Mr.
18 Clinton, Mr. Nwokiu and Mr. Rosal directing each to show
19 cause why they should not be held in contempt for failing to
20 respond to the order of November 26th.

21 Anything else, Ms. Schalet?

22 MS. SCHALET: Your Honor, may I make a motion for
23 conditional certification at the same time under 216(b)?

24 THE COURT: Sure.

25 MS. SCHALET: Thank you.

1 THE COURT: I'm not sure --

2 MR. SPITALERI: Let me --

3 THE COURT: One second. One second. Let me just --
4 I'm not sure where you're going, Ms. Schalet. I'm getting
5 more confused by the minute. Usually it's not a funny thing.
6 My recollection is that you had about 16 opt in plaintiffs
7 here.

8 MS. SCHALET: Yes.

9 THE COURT: And the settlement was with the 16 with
10 the opt in plaintiffs.

11 MS. SCHALET: Yes.

12 THE COURT: My recollection is it did not settle as
13 a class.

14 MS. SCHALET: Correct.

15 THE COURT: What would be the purpose of a motion for
16 conditional certification? If you get more plaintiffs opting
17 in presumably that's going to kill the settlement.

18 MS. SCHALET: I guess it would be in the alt --

19 THE COURT: Unless the settlement gets divided among
20 a greater number in which case the plaintiffs were currently
21 in the case each one would get a smaller amount. I'm not sure
22 -- I'm not telling you you can't do it but I'm not sure I
23 understand why you want to move for -- seek conditional
24 certification and at the same time enforce the settlement.
25 They seem to be divergent paths.

1 MS. SCHALET: I would -- I think you're correct.

2 THE COURT: Is that what you want to do?

3 MS. SCHALET: I guess I want to think about it. I
4 don't think I can ask for one in the alternative. So I don't
5 think it works. So I think yes.

6 THE COURT: Maybe the threshold question is to
7 determine whether or not the settlement is enforceable. If
8 the settlement is enforceable it seems to me that conditional
9 certification would serve no purpose.

10 MS. SCHALET: Correct.

11 THE COURT: If the case -- if the settlement is dead
12 and the case is going to go forward then maybe conditional
13 certification makes sense but seeking to expand the pool of
14 plaintiffs while you're seeking to settle seems to be pulling
15 in opposite directions.

16 Did you want to say something off the record or
17 discuss something off the record, Ms. Schalet?

18 MS. SCHALET: Yes, I still think we should settle the
19 case.

20 THE COURT: Let's go off the record for a minute.

21 [Off the record.]

22 THE COURT: As a result of the off the record
23 discussion I've asked Mr. Spitaleri to let me know by -- to
24 send me a fax by Thursday the 12th of December advising whether
25 or not his client is interested in further settlement

1 discussions before a mediator. If both parties are interested
2 in further settlement discussions before a mediator I will
3 refer it to the mediation panel. Unless both sides are
4 interested in further settlement discussions before a mediator
5 I don't think there's any point in referring it.

6 I'm going to issue an order to show cause to the
7 witnesses who were supposed to be here today but who didn't
8 appear. That's Mr. Clinton, Mr. Nwokiu and Mr. Rosal
9 directing each to show cause why they should not be held in
10 contempt for failing to appear today. The defendant -- the
11 plaintiff is going to make her motion to enforcement the
12 judgment by January 5th.

13 If the case does go to mediation I will adjourn that
14 date but otherwise I'll expect the settlement -- the motion to
15 enforce the settlement by January 5th.

16 Anything else from the plaintiff's side?

17 MS. SCHALET: Thank you.

18 THE COURT: Anything else from defendant's side?

19 MR. SPITALERI: No, Your Honor. Thank you.

20 THE COURT: Thank you all.

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

4

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6 Shari Riemer

7 Dated: January 9, 2014

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